

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2192.

753

ARLINGTON BREWING COMPANY, INCORPORATED,
APPELLANT,

vs.

BLUETHENTHAL & BICKART, INCORPORATED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 18, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2192.

ARLINGTON BREWING COMPANY, INCORPORATED,
APPELLANT,

vs.

BLUETHENTHAL & BICKART, INCORPORATED,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

	Original.	Print
Caption.....	<i>a</i>	1
Declaration	1	1
Particulars of demand	3	3
Pleas.....	4	3
Joinder in issue.....	4	4
Memorandum: Jury sworn and verdict for plaintiff.....	5	4
Motion for new trial overruled; judgment on verdict ordered; judgment.....	5	4
Appeal noted in open court.....	6	5
Memorandum: Appeal bond approved and filed.....	6	5
Bill of exceptions made part of record.....	6	5
Bill of exceptions.....	7	5
Testimony of Joseph A. Burkart.....	9	7
Thos. F. McNulty.....	10	7
Moses E. Pach.....	12	8
Abe King.....	15	9
Wm. McGuire.....	16	10
Charge to jury	20	12
Directions to clerk for preparation of transcript of record	27	16
Clerk's certificate.....	29	16

In the Court of Appeals of the District of Columbia.

No. 2192.

ARLINGTON BREWING COMPANY, INC., Appellant,
vs.
BLUETHENTHAL & BICKART, INC.

a Supreme Court of the District of Columbia.

No. 51356. At Law.

BLUETHENTHAL & BICKART, INC., Plaintiff,
vs.
ARLINGTON BREWING COMPANY, INC., Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Jan. 27, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51356.

BLUETHENTHAL & BICKART, INC., Plaintiff,
vs.
ARLINGTON BREWING COMPANY, INC., Defendant.

The plaintiff sues the defendant for that whereas:

(1). The plaintiff is a corporation duly organized under the laws of the State of Maryland, having its principal office in the City of Baltimore in the State of Maryland and transacting business there and in the City of Washington, in the District of Columbia, and elsewhere.

The defendant is a corporation organized under the laws of the State of Virginia, and transacting its principal business in the City of Washington, in the District of Columbia, wherein most of its principal officers reside.

That on or about the 23rd day of September, 1908, the defendant duly made and delivered its one certain promissory note dated at Washington, D. C., September 23, 1908, whereby it promised to pay to the order of Thomas F. McNulty by the name of "Thos. F. McNulty," the sum of five hundred dollars (\$500.00), ninety (90) days after date at the National Metropolitan Bank for value received, with interest at the rate of six per cent (6%) per annum. That there-

upon and thereafter the said Thomas F. McNulty duly endorsed said note and delivered it so endorsed to the plaintiff in the usual course of business, who received and accepted the same for value before maturity, and became and is now the owner and holder thereof.

That at maturity the said note was duly presented for payment, but the defendant did not pay the same or any part thereof, and the said note was duly protested.

Wherefore the plaintiff claims from the defendant on account of said note the sum of five hundred dollars (\$500.00), with interest thereon from September 23, 1909, at the rate of six per cent (6%) per annum, together with one and 97/100 dollars (\$1.97) protest fees, according to the particulars of demand hereto annexed and made part hereof, besides the costs of this action.

(2). And the said plaintiff sues the defendant for money due and payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at its special instance and request; and for money paid by the plaintiff for the defendant at its request; and for money received by the defendant for the use of the plaintiff, and for money lent by the plaintiff to the defendant; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims the sum of five hundred dollars (\$500.00), with interest thereon from September 23, 1908, together with protest fees amounting to \$1.97 according to the particulars of demand hereto annexed, besides the costs of this action.

3 And the plaintiff demands judgment against the defendant for the full sum of five hundred (\$500.) dollars with interest thereon from September 23, 1908, protest fees amounting to one and 97/100 dollars (\$1.97) according to the particulars of demand hereto annexed, besides the costs of this action.

JOS. A. BURKART,
Att'y for Pl'tff.

Particulars of Demand.

\$500.00.

WASHINGTON, D. C., *Sept.* 23, 1908.

Ninety days after date we promise to pay to the order of Thos. F. McNulty, Five hundred dollars, at National Metropolitan Bank.

Value received with interest 6%.

(Signed)

ARLINGTON BREWING CO.

WM. McGUIRE, *Pres.*

ABE KING, *Treas.*

Endorsed: Thos. F. McNulty, Pay to National Metropolitan Bank, For collection for Account of Bluethenthal & Bickart, Inc., Balto., Md. Payment stopped.

UNITED STATES OF AMERICA,

District of Columbia, To wit:

Be it known, That on the 22nd day of December, in the year nineteen hundred and eight, I, Alfred B. Briggs, Notary Public residing in the said District, duly commissioned and sworn at the request of the National Metropolitan Bank of Washington, presented the original note hereunto attached at the National Metropolitan Bank, Washington, D. C., and demanded payment thereof whereunto I was answered by a Teller, "Payment Stopped."

Therefore, I, the said Notary, at the request aforesaid, have protested, and by these presents do solemnly protest, against the makers and Endorsers of the said note and all others whom it may or doth concern, for all costs, exchange, charges, damages and interest suffered and to be suffered for want of payment thereof. And on the same day I mailed, notice of protest to each endorser, viz:

Notice for Thos. F. McNulty, Directed to—Bluethenthal & Bickart, Inc., Baltimore Md.

4 " " Bluethenthal & Bickart, Inc., Directed to Bluethenthal & Bickart, Inc., Baltimore, Md.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal the day and year aforesaid.

(Signed)

ALFRED B. BRIGGS,

[SEAL.]

Notary Public.

Protesting	\$1.75
Notices	.20
Postage	.02

\$1.97

Recorded, book a/2, page 1006.

Pleas.

Filed Feb. 16, 1909.

* * * * *

1. For a plea to the first count of the plaintiff's declaration the defendant says it never promised as in said declaration alleged.

2. And for a plea to the second count of said declaration the defendant says it is not indebted to the plaintiff in whole or in part as therein alleged.

LORENZO A. BAILEY,
Attorney for Defendant.

Joinder in Issue.

Filed Feb. 24, 1909.

* * * * *

5 The plaintiff joins issue upon each and every of the pleas filed by the defendant herein.

JOS. A. BURKART,
Attorney for Plaintiff.

Memorandum.

May 11, 1910.—Jury sworn and verdict for Plaintiff for \$500. & interest from September 23, 1908.

Supreme Court of the District of Columbia.

FRIDAY, May 20th, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Claibough, Chief Justice, presiding.

* * * * *

Upon consideration of defendant's motion for a new trial filed herein by its attorney of record, it is ordered, that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant herein the sum of Five Hundred Dollars (\$500.00) with interest thereon from September 23, 1908, being the money found payable by defendant to said plaintiff by reason of the premises, together with costs of suit to be taxed by the Clerk and have execution thereof.

6

Supreme Court of the District of Columbia.

FRIDAY, *May 20th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * *

Now comes the defendant by its attorney of record, and in open court notes an appeal to the Court of Appeals of the District of Columbia, whereupon, the penalty of a bond to operate as a supersedeas is fixed in the sum of One Thousand Dollars.

Memorandum.

June 6, 1910.—Appeal bond approved and filed.

Supreme Court of the District of Columbia.

THURSDAY, *June 30th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * *

Comes now the defendant by its attorney Mr. Lorenzo A. Bailey, and presenting to the Court the Bill of Exceptions taken at the trial of this cause prays that the same be signed and made of record, nunc pro tunc, which is accordingly done, and so ordered.

7

Bill of Exceptions.

Filed June 30, 1910.

* * * * *

Be it remembered that at the trial of this cause in the Supreme Court of the District of Columbia on the 11th day of May, 1910, before the Honorable Harry M. Clabaugh, Chief Justice of said court and a jury, being cause at law No. 51,356, wherein Bluethenthal & Bickart, Inc., a corporation, is named as plaintiff and Arlington Brewing Company, a corporation, is named as defendant, the plaintiff to maintain the issues on its part joined adduced evidence tending to prove that on or about February 16, 1908, Thomas F. McNulty, who had been for about ten years engaged in the wholesale liquor business in the city of Baltimore, Md. selling his goods in Baltimore, Washington and elsewhere, sold his entire stock of liquors to the plaintiff corporation, which prior to January 1st, 1908, had been engaged in the same business in Atlanta, Georgia, but which had moved to Baltimore, and became one of its vice presidents and its general manager for the District of Columbia; that he retained all

book accounts of his former business, including a promissory note for \$1900. dated November 23, 1907, made by Thomas F. Fay who was engaged in the retail liquor business in said City of Washington, which note was secured by a deed of trust in which Joseph A. Burkart, a member of the bar of this court, was named as trustee, covering said Fay's business including the lease for his place of
8 business, his retail liquor license and the fixtures and stock in trade at his place of business; that said note was in payment of a former note of June 16, 1905, by the said Fay for \$1192.93 secured by a similar deed of trust and for \$707.07 of credits extended to the said Fay by the said McNulty intermediate the making of the said notes; that Fay made default in the payment of said note of November 23, 1907 upon which he then owed McNulty \$1900. and thereupon, by direction of said McNulty, the said trustee Burkart, in August, 1908, took possession of said business and advertised the same for sale at auction under the deed of trust and placed Moses Pach as his manager in charge of said business pending such sale, and notified the defendant, Arlington Brewing Company, to whom he knew Fay was indebted, of his action as trustee; that two or three days before the sale a conference was had at Mr. Burkart's office by and between himself, McNulty, Pach, Abe King, secretary and treasurer of the defendant corporation, and William McGuire, President of the defendant at which conference, all present concurring, it was arranged that Pach should buy Fay's business for \$3500.00 of which \$2200 was to be paid to McNulty and \$1300 was to be paid to the defendant, the \$2200 for McNulty being payable as follows, \$500. in cash to be advanced by the defendant, and the defendant's 90 day note for \$500. and Pach's note for \$1200. secured by a first trust on said business, and that for the \$1300 to be paid to the defendant together with the \$1000. to be advanced in cash and by note as aforesaid Pach would give his note to the defendant for
9 \$2300. secured by a second trust on said business; that the \$2200. so payable to McNulty included the \$1900. due him on Fay's note and \$300. for expenses for advertising the sale and the trustee's commissions; that at the auction sale on August 28, 1908, two or three days after said conference Pach was the highest bidder and became the purchaser of said business at the nominal price of \$1900; that about a month was required in getting the consent of the Excise Board to the transfer of the retail liquor license to Pach and on the 23d or 24th of September, 1908, the business was transferred to Pach who then complied with the terms agreed upon at the conference as hereinbefore stated by paying McNulty \$500. in cash and giving him the defendant's 90 day note for \$500. and his own note for \$1200. secured as aforesaid and by giving defendant his note for \$2300 secured as aforesaid; that the said 90 day note for \$500. is the note mentioned in the plaintiff's declaration; that all said notes and both of said deeds of trust were dated September 23, 1908; that, at the conference above mentioned and before Mr. McGuire had been called into it, Mr. McNulty had insisted upon re-

ceiving \$1000 in cash, saying he already had an offer of \$1,000. cash with a trust for the balance.

Thereupon the said JOSEPH A. BURKART, a witness produced, sworn and examined on behalf of the plaintiff, testified upon cross examination as follows: At the conference at my office as stated in the preceding testimony, after we had agreed upon the terms of this purchase by Mr. Pach, and almost at the time the parties were separating, Mr. McNulty suggested that it would be necessary for Pach to renew his license on the 1st of November, and that the Brewing Company or himself or both of them, would have to furnish him money, or advance some money to him, or they would have to advance him some stock on credit and give him enough time to sell the stock. McNulty suggested that he would furnish him about \$500. worth of credit for whiskeys, if the Brewing Company would allow their bill to run until it amounted to about \$500. so that Mr. Pach would have enough money to pay for his renewal of the license. The understanding was that each week Mr. Pach would bring to me the money he had after paying actual expenses of running the place, and taking out for himself the amount of wages agreed upon, until he had \$800. to go to pay the renewal fee for the license, and he did that. McNulty was then one of the plaintiff's Vice Presidents and its General Manager in this District.

Next, the said THOMAS F. McNULTY, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows: Mr. Burkart, as my attorney, was authorized to collect the \$1900. due on Fay's note. I had a premium due on my life in the New York Life Insurance Company, \$936, that matured on the 29th of August. I had hoped this transaction would be carried through before that time, and I would have had the money in my hands to pay that premium. I went to the firm of Bluethenthal and Bickart and told them that such action was pending, that I was trying to liquidate in Washington this bill of sale I had, and asked them if they would give me \$936.36 and they gave it without any hesitancy, by a check made out to the New York Life Insurance Company for that amount of money. When Mr. Burkart settled on the thousand dollar basis of \$500. cash and a note for \$500, after his commissions were taken out, I think I received something like \$290 in cash and this note for \$500. I immediately turned over to them in cash the difference between \$500 and \$936.36, and also the \$500. note. I turned that over to the firm of Bluethenthal and Bickart and thereby liquidated the indebtedness which they had advanced for the payment of this life insurance.

Upon cross examination the said McNulty further testified as follows: At the conference mentioned in the preceding testimony, after we had agreed upon what we were going to do, Mr. King was eulogizing Mr. Pach's ability to do business and I said I thought he was a pretty decent sort of a man but I did not think he could go down there into Fay's place without some aid, as I did not think he could succeed without some aid from us in some way.

Q. Who did you mean by us? A. The brewery and myself were figuring how to help him out, Mr. King and myself agreeing to do it, and I did say I would be willing to extend to him a line of credit, upon the statement of Mr. King, who said this man Pach had the ability to conduct his business, and was a good honest man and all that.

Q. How much were you to extend? A. About \$500.

Q. Well, you had no goods of your own, had you? A. No, I expected that if Mr. Pach was the man Mr. King said he was, I would have no difficulty in getting all the goods I wanted.

Q. You, as a matter of fact, were speaking of Bluethenthal and Bickart, were you not? A. No; I don't know that I
12 was.

Q. Did you report to them that you had agreed to extend this credit? A. I sent an order in, expecting it would be filled. I sent it in good faith.

(Witness resuming:) Pach called on me for the credit and I got a letter from him or from Mr. Burkart.

Q. Do you remember that early in September, before this note was given, that Pach called upon you to send some goods, and you promised, on a Friday, to ship him goods on Monday, with Labels? Can you recall that? A. I can recall that he gave me such an order, and I turned it into the credit man of the house, and upon investigation of the responsibility of Pach, they turned the order down. They had a mercantile report from Dun and Bradstreet in which his credit was bad, and they would not, of course, send their goods. I carried out my particular end of trying to get the credit.

Next the plaintiff offered in evidence the note for \$500. mentioned in the declaration and thereupon the plaintiff rested.

Thereupon, the said MOSES E. PACH, a witness produced, sworn and examined on behalf of the defendant, testified as follows: The conference at Mr. Burkart's office was two or three days before the papers were drawn up. McNulty said he must have \$1,000 in cash. Mr. King was there at the time, and he said he would have to confer with Mr. McGuire, the President of the Arlington Brewing Company. They phoned for Mr. McGuire, and when he arrived, Mr. McGuire would not agree to the payment of \$1000. cash to liquidate the mortgage on the place. They conferred there, and
13 Mr. McGuire said he would give \$500 cash and would give a note for \$500, on condition that Mr. McNulty would extend to me that much credit in whiskeys, and that the brewery would extend to me the two months' beer bill, so that I could realize the money for the license, which was about six weeks previous to the new license. So they agreed to that, and the papers were made out accordingly.

Q. Was there anything said there as to whether Mr. McNulty was speaking for himself or for Bluethenthal and Bickart, about furnishing credit? A. He said the Brewery would have to come through to Bluethenthal and Bickart at the time.

Q. Did you ever get that credit from McNulty of Bluethenthal and Bickart? A. No, sir; neither one of them. Mr. McNulty

called me up on the phone, and said the goods were to be shipped on the following Monday. I think it was either Thursday or Friday, and he asked me what I wanted furnished, and what labels, and I told him the name and location and street and all, but as yet they have not arrived, and did not at that time.

The goods to be shipped, \$500 worth would have carried me in business two or three months. The defendant furnished me the beer on credit as agreed at the conference and extended me credit for four months instead of two months and in order to pay for my license November 1, I had to borrow \$150. from a bank on a note endorsed by the defendant and the defendant had to pay that
 14 note and I have not been able to pay the defendant for that or for the beer or anything on account of the \$2300. second trust note. Eventually I had to close up and go out of business entirely, on July 27, 1909, because I had to pay cash for my liquors. On the first trust to McNulty I made three payments of \$50. each. Early in January, 1909, I met Mr. Bailey attorney for defendant Brewing Company, in Mr. Burkart's office and, in reply to a question by Mr. Bailey Mr. Burkart then acknowledged that McNulty had agreed, for the \$500. cash and this \$500. note to be given by McGuire for his company, that McNulty would furnish me on credit the \$500. worth of liquor so I could realize with the assistance of the defendant, the amount of license money \$800. About October 1, 1908, after my phone conversation with Mr. McNulty I heard that he was in Hagerstown. I got his address and got Mr. Burkart to write to him in regard to the shipment that was agreed upon and I also wrote to the plaintiff, the firm of Bluethenthal & Bickart, in regard to the shipment and went over to Baltimore and called in person on that firm, and they then informed me that McNulty was out of town. I then inquired of the firm in regard to the shipment and left word with them in regard to it and while there I understood the goods would be sent me but a day or two later I received from the firm a letter which is as follows:

"DEAR MR. PACH: Replying to yours of the 1st, in connection with the order that you so kindly placed with Mr. McNulty, regret to inform you that under your present circumstances, and the condition of the whiskey business, we do not feel able to extend
 15 a line of credit that you want, and would, therefore suggest that you obtain supplies elsewhere.

Regretting our inability to serve you, and trusting you will meet with success, we are,

Yours very truly,

BLUETHENTHAL & BICKART, INC.

Next, ABE KING, a witness produced, sworn and examined on behalf of the defendant, testified as follows: I am Secretary and Treasurer of the defendant company. After Mr. Burkart advertised Fay's place for sale I called on Mr. Burkart and recommended Pach to him and suggested that Pach be allowed to take the business and give McNulty a first mortgage for what was due to him and give the defendant a second mortgage for the amount due it from Fay. Later

at a conference at Mr. Burkart's office, at which he and I, McNulty and Pach were present, after discussing terms for the acquisition of the place by Pach and while Mr. McGuire was on his way there in response to my request to him by phone, I said "How is Mr. Pach to get any money to conduct his business? It is but a short time before the renewal of the licenses. Where is he going to get the license money; being a man with a big mortgage on his place; naturally, nobody will give him any credit." Mr. McNulty turned around and said "You are right." I said "Suppose we agree to put up \$500. cash and give a note for \$500? I said, "Mr. McNulty, are you willing to give credit for \$500. worth of whiskey"? He said, "Yes; I think I will do that." I said, "When Mr. McGuire gets here I will put this proposition to him: In consideration of our giving him \$500 in cash and a note for \$500, you agree to give Mr.

16 Pach credit for \$500; the brewery will give him his beer and he can run up to the 1st of November, and after that date he will pay for his beer weekly." Mr. McNulty says, "Yes; those terms are all right. I am satisfied. If Mr. McGuire will agree to it, we can close the deal." That was before the note was executed and the note was executed on those conditions. When Mr. McGuire came I put it up to him. First, Mr. Burkart said to Mr. McGuire he should give \$1,000. and Mr. McGuire said, "No, sir; we can't do that. We have already extended credit to the amount of \$1600 in the place, part in cash; we cannot see our way clear to do that." I turned and said, "Mr. McGuire, how about this proposition which I suggested to Mr. Burkart and Mr. McNulty?" I said, "Mr. McNulty will give Mr. Pach \$500 in credit. We will endorse Mr. Pach's note for \$500, and take \$500 in cash, and we will get a second mortgage on the place for the amount due us." Mr. McGuire thought a while, and said, "Mr. King do you think that is best?" I said then, "It is the best of a bad bargain, because we will lose every cent we have if the place is closed out at sale. Mr. McNulty is protected and we are not." He said, "All right, we will do it."

Next, WILLIAM MCGUIRE, a witness produced, sworn and examined as a witness on behalf of the defendant, testified as follows: I am President of the defendant corporation. The only time I was at Mr. Burkart's office in reference to this matter was when I signed as President the \$500. note now sued on. I went there in response to a request by phone from Mr. King. Messrs. Burkart, McNulty, Pach and King were there. They then told me it was arranged that our company the defendant, would give \$500. in 17 cash and a note for \$500. and also credit for \$500 in beer and that Mr. McNulty would give \$500 in credit for whiskey, which would be \$1,000. for Pach to start his business on. That agreement was the only consideration for this \$500. note. Our company furnished the beer agreed.

And thereupon the defendant rested.

No further evidence was offered by either of the parties and the foregoing is all the evidence in the case.

Thereupon, in the presence and hearing of the jury the following colloquy ensued, between Mr. Bailey, counsel for defendant, and the court:

"Mr. BAILEY: Your Honor, before we go to the jury, there is one thing I would like to have clear. I have not prepared any instructions. I take it your Honor will charge the jury as to the notice the corporation had as to the knowledge of its officers. That is the only thing.

The COURT: Well, I do not know whether the law would be that in this case, unless the jury believe that the Company knew of the transaction, or knew of the giving of this note at the time he took it, and that it was given under such consideration.

Mr. BAILEY: I had reference to the imputed knowledge of the corporation, the charge of knowledge of its officers as to the consideration or conditions under which it was given.

The COURT: That would be so if the matter were a part of the business of the corporation. Now, if the jury believe that

18 Mr. McNulty turned this note over to them as a part of a business transaction for the company, then his knowledge of what the note was given for would be its knowledge too. If the jury, on the other hand, should find that he sold the note to them as an independent transaction, in other words, if they gave him the face value of the note in money, independently of this transaction, then, of course, that would not impute any knowledge to them. Knowledge to the corporation could only be imputed in a business transaction that takes place in connection with the business or affairs of the corporation. In other words, I assume the law of the case is this: that if that note was given in consideration of the fact that McNulty was to extend this credit to this man Pach, and he did not do it, then there would be a failure of consideration as between him and the brewing company; but if he actually sold the note and the plaintiff company knew nothing about the transaction, but paid for the note as a bona fide transaction, without knowledge, then they could recover, if the jury find there had been such a transaction.

Mr. BAILEY: If it comes to that I will take an exception.

The COURT: Very well. In other words, if I happen to be in a company and somebody gives me a note entirely outside of the company's business, and I sell that note to the company for a bona fide consideration, for value, without any notice to the company——

Mr. BAILEY: It is in evidence here that he was one of the vice presidents and general manager for the District of Columbia, one of the principals, and his knowledge certainly would be knowledge——

The COURT: His knowledge of what?

19 Mr. BAILEY: His knowledge that he had — here at the time the note was given and agreed to be given. He was here not only as McNulty, but was here as a representative of Bluethenthal and Bickart.

The COURT: That is the question. Was he? If the jury believe he was in this concern and was representing it, as Mr. King says he told him he was—if the jury believe he was representing this

plaintiff, then, of course, it is the act of the plaintiff, but, on the other hand, if they believe he was only acting in his individual capacity and they gave him the note purely in his individual capacity, and then he sold it to the plaintiff company and got money on it to the amount of the value of the note, then the plaintiff company had no notice that it was connected with any transaction with which it was concerned, and, of course, you could not impute knowledge to the plaintiff company under those circumstances.

The pure question in this case is: Does the jury believe that in taking this note, he was acting for the company? If he was, then, the company had knowledge of it. On the other hand, if he was acting in his individual capacity in a transaction with which the company had no concern and he got the money from them for it, it seems to me that would not impute knowledge.

Mr. BAILEY: I understand that would be the case with an ordinary agent, but where a man is one of the principal officers of a company, he is simply taking it out of one hand and putting it in the other.

20 The COURT: If the jury find that is so, of course it would be taking it from one hand and putting it in the other; but suppose, as a matter of fact, they would find that this transaction had nothing to do with the company. He testified he never passed one dollar of his credits or books accounts against anybody to the company. The company surely would not be concerned officially with his private business, that is, concerned to the extent of having knowledge imputed to them? Do you see what I mean?

Mr. BAILEY: I catch your Honor's meaning, but I had a different view of the law, and I will have to argue it on a different theory. Your Honor will give me an exception?

The COURT: Certainly. It seemed to me that there ought to be some law suggested. Go on.

Thereupon the Court charged the jury as follows:

"Gentlemen of course when you decide cases, you must decide them according to the law which the Court lays down to you and according to the facts that have been testified to in the case. You are to consider fairly and impartially any given evidence, but you are not to supply evidence. You can, of course, infer and arrive at a conclusion from any given evidence, but, if the inference is not based on the evidence in the case, of course you cannot do so. In other words, you cannot imagine things that may have happened or must have happened. You must always decide those things upon the evidence in the case.

Now, the law of this case is divided into two different parts. You know that when a man gives a promissory note for the payment of money, and you prove his signature to that note, that is
21 usually the prima facie proof of the note. So that a plaintiff has always accomplished his part of the case when he offers the note in evidence, and then it becomes incumbent upon the defendant to show that he does not owe the note, because the plaintiff, having the note in his possession, has prima facie evidence that the note is due and owed. Then the defendant comes in and he says,

"I do not owe that note, because there was a condition annexed to the note, which has not been fulfilled. That is a condition which was part of the consideration. You can go that far in attacking a note. You cannot say that a note was given with the understanding that it was not to be paid, or anything of that kind, because that would be showing something that was connected with the giving of the note, which, of course, the law would not permit; but where you attack the consideration of the note you can show that the consideration has never been gratified, and therefore you do not owe it—that is as between the party who made the note and the party to whom the note was given.

On that theory it is the law that where a party gives a note based upon a promise, and that promise is not fulfilled by the party to whom the note is given, then he does not have to pay the note, provided you find that the promise was made and broken.

So that in this case, therefore, if you can find there is this prima facie proof of the note by the signing of it, and then the defendant comes in and says, "It is true, I gave you that note, but I gave it to you on the condition that you were to advance credit of \$500. to Pach," then the burden of proof is upon the defendant to show that was the condition upon which this note was given.

So that the defendant has to show by the fair weight of the testimony that the note was given in consideration of the facts that Mr. McNulty promised a credit of \$500, which he did not give.

Now, if that is the condition of the note as between Mr. McNulty and the Brewing Company, and you believe by the fair weight of the testimony that that was the condition of giving this note, and it has not been conformed to, your verdict would have to be for the defendant in this case.

But there is another phase of the law of the case.

It does not make any difference whether McNulty made this promise or not. He may have made the promise, and it may have been absolutely violated and deliberately violated still that would have no effect upon the note whatever, and the defendant in this case would have to pay it, provided McNulty, before the note became due, transferred it to a bona fide holder for value, without notice. Every business man knows that it would be a dreadful condition of the law if that were not so. If you give a note to a man in good faith, and the man to whom you give it afterwards discovers that it is reeking with fraud, for instance, and he passes it on to some third party, who does not know anything about the fraud, and did not know anything about the consideration for which it was given when he advanced the money on it, then the bona fide holder without notice would be entitled to recover, no matter how much fraud there might be as between the maker and the payee. If that were not so, all our business transactions would simply stop.

23 That leads me, then, to another point in the case which, I am sure, you all understand, and that is that when a note is passed to a third party before maturity, for a bona fide consideration

and for value, without notice of what it was given for, then that third party can collect, no matter what the note was given for.

McNulty is not the plaintiff in this case, but Bluethenthal and Bickart Company is the plaintiff, and therefore it follows that if you find there was no such consideration, they would be entitled to recover on that ground whether they knew or not; *but if you find there was a consideration in this case that this note was given upon the express condition that McNulty was to furnish the credit of \$500, it would not make any difference that such credit was not furnished if the plaintiff in this case, which is Bluethenthal and Bickart, did not know for what the note was given, but bought the note from Mr. McNulty by paying him this money that he said they did pay. If they did it before the note matured, and without any notice of what the note was for, then they are entitled to recover, no matter what occurred between McNulty and the Brewing Company.*

But, if from the evidence in the case, you should find further that McNulty in taking that note was acting for the plaintiff, Bluethenthal and Bickart, and that the note which was given to McNulty was really given to Bluethenthal and Bickart, or that they knew when they took the note that this transaction had taken place, and then you find that the consideration was based upon the fact that they would extend this credit, or McNulty would extend this credit the plaintiff would not be entitled to recover.

Ordinarily, notice to or the knowledge of an agent, an officer of a corporation, such as this officer would be in this particular case is the knowledge of or notice to the corporation. There does not seem to be the slightest proof of what the duties of vice president were. Still, if in this case, you find that Mr. McNulty was the Vice President of this company, and that when he took this note he was really taking it for the plaintiff in this case, his knowledge would be imputed to the plaintiff in this case, and if you find it was based on the consideration of his advancing the \$500. credit, the plaintiff would not be entitled to recover.

In other words, a person who buys a note, no matter how much fraud or want of consideration or anything else there is between the maker and payee of the note, if he takes it before maturity and without notice of what it was given for and pays bona fide value for it, then he is entitled to recover, no matter what took place in the first place.

Now, in this case, the note is not made by Pach, but is made by the Arlington Brewing Company and payable to Mr. McNulty, but he has assigned it to the plaintiff in this case, Bluethenthal and Bickart. *Now, if Bluethenthal and Bickart knew nothing about the transaction between these parties and gave the money for it in good faith, before the note matured, and without notice of any impairment of the consideration of that note when they bought it, they are entitled to recover, no matter what was the consideration as between Mr. McNulty and the Brewing Company, unless you find that McNulty really was, when he took the note, acting for the plaintiff in this case, Bluethenthal and Bickart.*

Now, gentlemen, I think you ought to understand that. It is a transaction that every business man understands. It is one of the things that every man has to meet and I have endeavored to make it as plain as I can.

In other words, if you find the note was not given for this conditional consideration, then, of course, the plaintiff would be entitled to recover under every phase of the case; but if you find, from the evidence in the case, that the plaintiff, Bluethenthal and Bickart, knew what the consideration given for this note was, or that McNulty was only acting for them, and that he assigned them his credit, then, of course the plaintiff would not be entitled to recover, unless you find that the note was not based upon the consideration which the defendant claims it was.

On the other hand, if you find that they had nothing to do with it; that they simply bought the note and gave McNulty the money with which he says he paid his life insurance then they would not have notice and knowledge.

Mr. BAILEY: I wish to make a formal request that your Honor instruct the jury that the plaintiffs were chargeable with knowledge, imputed knowledge or notice of whatever Mr. McNulty knew. That is what I spoke of a while ago, and I understand your Honor overrules that?

The COURT: Yes, I overrule that. The jury understands that if this transaction was in any wise connected with Bluethenthal and Bickart, then his knowledge would be imputed to them.

26 Mr. BAILEY: I am trying to go a little farther than that, your Honor.

The COURT: I understand; but I want to make that my ruling. That is my ruling, that if it was connected in any way with Bluethenthal and Bickart, if they had anything to do with it, then his knowledge is imputed to them. In reply to your theory I would say that if a man sold a horse for somebody and a note was given for that horse, which he would sell to the firm of which he was a partner, or of which he was an agent, because he had been connected with the company as agent or partner, whatever it was, therefore his knowledge about that horse would be imputed to his firm."

To which action by the court in overruling the instruction so as aforesaid requested by counsel for defendant and also separately to each of those portions of the charge relating to imputed knowledge, which portions are underscored or in italics the defendant, by counsel, then and there duly excepted, which exceptions were separately noted by the Justice in his minutes.

And thereupon the jury retired to consider of their verdict and thereafter returned a verdict for the plaintiff for \$500. with interest from September 23, 1908, upon which verdict judgment for plaintiff was entered on the 20th day of May, A. D. 1910, and thereafter the defendant by its attorney duly presented and submitted the foregoing bill of exceptions and prayed the Court to settle and sign the same and cause the same to be duly entered of record, which is accordingly done, nunc pro tunc, this 30th day of June A. D. 1910.

HARRY M. CLABAUGH,

Chief Justice.

27 The plaintiff will take notice that at 10 o'clock A. M. on the fifth day of July, A. D. 1910, or as soon thereafter as counsel may be heard, the defendant will present to the court and move the court to settle, sign and enter of record, a bill of exceptions in the above entitled suit, of which proposed bill of exceptions the foregoing is a copy.

LORENZO A. BAILEY,
Attorney for Defendant.

Service of the foregoing notice and of a copy of the proposed bill of exceptions therein mentioned is hereby acknowledged this 23d day of June, A. D. 1910.

JOS. A. BURKART,
Attorney for Plaintiff.

I consent that this bill be signed.

J. ALTHEUS JOHNSON,
Attorney for Plaintiff.

Directions to Clerk for Preparation of Transcript of Record.

Filed Jun- 30, 1910.

* * * * * *

The Clerk of said Court will please prepare the transcript of record on appeal including therein Declaration with particulars of demand; Pleas, Joinder; Memo. showing jury sworn; Verdict; Judgment; Appeal noted in open Court; Memo. showing filing of
28 Appeal Bond; Bill of Exceptions and this order.

Omit notice to plead & affidavits with declaration and pleas.

LORENZO A. BAILEY,
Attorney for Defendant.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51356 at Law, wherein Bluethenthal & Bickart, Inc. is Plaintiff and Arlington Brewing Company, Inc. is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of July, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2192. Arlington Brewing Company, Inc., appellant, vs. Bluethenthal & Bickart, Inc. Court of Appeals, District of Columbia. Filed Jul- 18, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC. -- 3 - 1910

IN THE

Henry W. Hodges.
Court of Appeals, District of Columbia *Clark.*

—
No. 2192.
—

ARLINGTON BREWING COMPANY, INCORPORATED, *Appellant,*

vs.

BLUETHENTHAL & BICKART, INCORPORATED, *Appellee.*

—
BRIEF ON BEHALF OF APPELLANTS.
—

LORENZO A. BAILEY,
Attorney for Appellant.

IN THE
Court of Appeals, District of Columbia

No. 2192.

ARLINGTON BREWING COMPANY, INCORPORATED, *Appellant*,

vs.

BLUETHENTHAL & BICKART, INCORPORATED, *Appellee*.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF CASE.

In the Supreme Court of the District of Columbia, the appellee, hereinafter designated as the plaintiff, sued the appellant, hereinafter designated as the defendant, upon a promissory note made by the defendant for the sum of \$500, payable to the order of Thos. F. McNulty, and by him endorsed to the plaintiff. The defendant pleaded the general issue upon which the plaintiff joined. At a trial by jury verdict was rendered for plaintiff for the amount of the note, \$500, and interest, and judgment was entered thereon accordingly, from which the defendant duly prosecuted this appeal.

The only question involved in this appeal is whether or not the plaintiff, a corporation, was chargeable with imputed notice or knowledge of what was known and done by McNulty, its Vice-President and General Manager, when he procured the making of the note in suit. This question was reserved by the defendant in a bill of exceptions constituting part of the printed record and containing all the evidence.

The undisputed facts in evidence are as follows: In January, 1908, the plaintiff, a corporation, engaged in the wholesale liquor business at Atlanta, Ga., moved to Baltimore, Md., and a month later purchased the wholesale liquor business and entire stock of liquors of Thomas F. McNulty, who had been engaged in that business for about ten years in Baltimore, Washington, D. C., and elsewhere. The transfer did not include his book accounts. He then became one of the Vice-Presidents of the plaintiff and its General Manager for the District of Columbia. One of the accounts not included in the transfer, but retained by him, was a promissory note dated November 23, 1907, made by Thomas F. Fay, for \$1,900, and secured by a deed of trust on Fay's retail liquor business in this District, including bar room license and chattels. In August, 1908, at a foreclosure sale under said deed of trust, Moses Pach became the purchaser. Two or three days before the sale, and about a month before the note in suit was made, a conference was had at the office of Mr. Joseph A. Burkart, who was the trustee in the deed of trust. At the conference were Messrs. Burkart, McNulty, Pach, Abe King, who was Secretary and Treasurer of the defendant corporation, and William McGuire, President of the defendant, and it was then arranged and understood by and between them that Pach, who was without means, should pay \$3,500 for Fay's business, of which \$2,200 was for McNulty (includ-

ing the \$1,900 note and \$300 for expenses of sale) and \$1,300 was for the defendant, being its unsecured claim against Fay; that the defendant should advance on Pach's account \$1,000, to be paid to McNulty and that Pach should give McNulty a first trust on the business for the balance due McNulty, \$1,200, and give the defendant a second trust on the business for \$2,300; that McNulty should furnish Pach with whiskey on credit to the value of \$500, and that the defendant should furnish Pach with beer on credit to the value of \$500; that McGuire, on behalf of the defendant, consented to this arrangement only because of McNulty's agreement to furnish the \$500 credit for whiskey; that in reference to the question whether McNulty was speaking for himself or for his house, the plaintiff, he stated at the conference that the Brewery "would have to come through to Bluthenthal and Bickart," and McNulty upon cross-examination (Rec., 8), when asked the direct question, "You, as a matter of fact, were speaking of Bluthenthal and Bickart, were you not?" evaded the issue by answering: "No; I don't know that I was?" but admitted that when Pach ordered the goods he sent the order in to his house, the plaintiff. About a month after this conference the sale was consummated as arranged, the defendant advancing the \$1,000 in a check for \$500 and the \$500 note in suit, and also advanced the agreed credit of \$500 in beer, and Pach gave the first and second trusts for \$1,200 and \$2,300, respectively, but McNulty and the plaintiff failed and refused to furnish the agreed credit of \$500 in whiskey or any whiskey, and in consequence thereof Pach failed and had to close up his business.

The transfer of the note in suit from McNulty, the payee, to the plaintiff was made after he had sent in Pach's order for the whiskey and the plaintiff later refused to fill the order (Rec., 8, mid-page). Plaintiff received the note from

McNulty in part payment of a loan to him about a month previously (Rec., 7, McNulty).

ASSIGNMENT OF ERRORS.

The court erred in refusing to instruct the jury, as requested by defendant, that the plaintiff was chargeable with notice and imputed knowledge of the facts known to McNulty, when he transferred the note to the plaintiff, a corporation, of which he was then a Vice-President and General Manager for the District of Columbia, where the note was made and was payable (Rec., 11-15).

POINTS AND AUTHORITIES.

A corporation is affected with notice of private dealings between its officers and third persons where such officer is the organ of communication with the outside world and is the proper officer to receive and communicate notice of the particular fact to it.

Harrington vs. United States, 11 Wall., 356.

10 Cyc., 1054, 1055, 1064, and cases cited.

When McNulty agreed to furnish the whiskey on credit he had no whiskey of his own. He made that agreement as an officer and General Manager of the plaintiff's business in this District, and at the same time upon that agreement obtained the note in suit which he at once turned over to the plaintiff in part payment of his antecedent unsecured debt to the plaintiff, and thereafter the plaintiff wrote Pach refusing to furnish the whiskey.

The judgment should be reversed.

LORENZO A. BAILEY,
Attorney for Appellant.

